

# Self-Defense and the State

Kimberly Kessler Ferzan\*

*This article seeks to explore whether and to what extent our understanding of self-defense depends upon a citizen's relationship with the state. Part II begins by setting forth Professor Kadish's claim that self-defense is "a right to resist aggression" that is held by a citizen against the state. After contending that such an account is insufficient to justify self-defense, the remainder of the article seeks to explore the relationship between the state and self-defense. Part III argues that self-defense is a pre-political moral right, as opposed to a political right that is constructed by the social contract. Recognizing that even if self-defense is a moral right it will eventually intersect with the state, Part IV examines this intersection, discussing how different theories of the state may yield different self-defense rules and how the state's failure to recognize self-defense may undermine its legitimacy. Part V discusses the relationship between the state and self-defense at the levels of constitutional right and criminal law rule. From this examination I ultimately conclude that a project that seeks to understand self-defense from a purely moral dimension is not only completely defensible but also most likely to yield answers to the fundamental disagreements about self-defense's justification, but a project that seeks to understand our criminal law's adoption of any particular self-defense doctrine must be cognizant of the multiple layers of moral, political, and jurisprudential theory that make the law what it is.*

## I. INTRODUCTION

Despite the intuitive sense that self-defensive acts are justified, theorists are at pains to explain just why this is so. Indeed, there is hardly a scholarly consensus. Some theorists propose rights-based accounts; others rely on lesser-evils analysis.<sup>1</sup>

In these varying accounts, the state's role shifts from fundamental to non-existent. Whereas George Fletcher vociferously argues for a central role for

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\* Professor of Law & Co-Director, Institute for Law and Philosophy, Rutgers University School of Law—Camden. I wish to thank Doug Husak and Jerry Vildostegui for helpful comments on this manuscript and Stephen Schulhofer and Joshua Dressler for inviting me to participate in this symposium. It is a privilege to have the opportunity to honor Professor Kadish.

<sup>1</sup> For two recent explanations, see FIONA LEVERICK, *KILLING IN SELF-DEFENSE* (2006) (offering a rights-based forfeiture theory), and BOAZ SANGERO, *SELF-DEFENCE IN CRIMINAL LAW* (2006) (offering a lesser-evils account).

political philosophy in criminal law theory,<sup>2</sup> leading accounts of self-defense do not even mention the state.<sup>3</sup> One of the few exceptions is the work of Professor Sandy Kadish. In his article, *Respect for Life and Regard for Rights in the Criminal Law*,<sup>4</sup> Kadish places the state front and center. The right to self-defense is none other than the right to resist aggression. It is a right held by the defender against the state.

Because an account of criminal law is an account of law, the state must play some role. But how much of a role does it play? As we seek the best account of the so-called “right to self-defense”—that is, an account that best coheres with both our moral intuitions and our legal doctrine—is the state the central player that Kadish claims? Or is the state’s participation more minimal? How important is the state to our theory of self-defense?

This article seeks to explore whether and to what extent our understanding of the right to self-defense depends upon a citizen’s relationship with the state. In Part II, I reintroduce the puzzle that Kadish sought to answer: What justifies self-defensive acts? After setting forth Kadish’s solution—the right to self-defense is a right to resist aggression—I part company with Kadish, arguing that his version of the political right to self-defense is not an account of self-defense at all. My purpose in this essay, however, is not to set forth an alternative theory of self-defense.<sup>5</sup> Rather, my goal is to lay bare the perimeters and parameters of the state’s involvement in self-defense.

Part III asks whether self-defense is a moral right or a political right by considering whether self-defense is a construct of the social contract. After arguing that self-defense is best construed as a pre-political moral right, in Part IV, I study the intersection of this moral right with political theory, including how different theories of the state might yield different self-defense rules and how the state’s failure to recognize self-defense might undermine its legitimacy. In Part V, I discuss the relationship between the state and self-defense at the levels of constitutional right and criminal law rule.

From this survey, I draw the following conclusions. First, viewing self-defense from the perspective of moral theory is not only a defensible project but also the approach most likely to yield answers as to why a defender may justly kill (if he may justly kill) a culpable or innocent aggressor. Second, whatever the moral right to self-defense entails, it will necessarily be filtered through our theory of the state. Thus, the criminal law’s right to self-defense must be understood as a product of both political and moral theory. Third, self-defense’s structure will also

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<sup>2</sup> See George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687 (2000).

<sup>3</sup> E.g., Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991).

<sup>4</sup> Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871 (1976).

<sup>5</sup> I have made a preliminary attempt elsewhere. See Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711 (2005).

have to yield to the structure and practicalities of law making. Ultimately, therefore, it seems that a project that seeks to understand self-defense from a purely moral dimension is completely defensible, but a project that seeks to understand our criminal law's adoption of any particular self-defense doctrine must be cognizant of the multiple layers of moral, political, and jurisprudential theory that make the law what it is.

## II. SELF-DEFENSE AND THE STATE: A FIRST TAKE

### A. Kadish's Right to Resist Aggression

Kadish's goal in *Respect for Life* is to uncover our settled judgments as to how we respect our lives and others' by unearthing the principles underlying our existing criminal law doctrines.<sup>6</sup> One of his primary concerns is self-defense. Self-defense is a criminal law doctrine that permits us to kill other people. Kadish seeks to find out why.

Kadish begins by sketching a map of our doctrinal terrain. As he notes, individuals are permitted to use deadly force against an unlawful aggressor when they reasonably believe it is necessary to prevent an imminent threat of death or serious bodily injury.<sup>7</sup> Some states require that an individual retreat when possible; other states do not.<sup>8</sup>

Kadish also reaches beyond self-defense's settled borders. While acknowledging that the question of whether one is justified in killing an innocent attacker was (and is) by no means settled in the law,<sup>9</sup> Kadish speculates that these instances are likely to be deemed justifiable, rather than excusable, and by implication, third parties may intervene to aid the defender.<sup>10</sup>

After setting forth the lay of the land, Kadish looks for rationales that explain the law. He notes that self-defense is regarded, not as an excuse, but a justification.<sup>11</sup> Kadish claims that viewing self-defense as a justification is consistent with our intuitions about self-defense and our view that third parties

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<sup>6</sup> Kadish, *supra* note 4, at 872.

<sup>7</sup> *Id.* at 875.

<sup>8</sup> *Id.*

<sup>9</sup> Innocent aggressors are those who lack mens rea for the attack, are excused for the attack, or are exempt from criminal punishment (e.g., the insane, the immature, and the mistaken). Innocent threats are those who do not satisfy the voluntary act requirement for the threat they pose, such as Robert Nozick's example of a man hurled down a well. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 34–35 (1974).

<sup>10</sup> Kadish, *supra* note 4, at 875–76. When an actor's conduct is justified, we claim that she did the right or permissible thing. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161 (1987). An actor is excused, on the other hand, when she has done something wrongful, but cannot fairly be blamed or punished for this wrongdoing. *Id.* at 1163.

<sup>11</sup> Kadish, *supra* note 4, at 881–82.

may intervene to aid the defender.<sup>12</sup> The question, then, is what is it that makes acts of self-defense justifiable?

Kadish rejects that self-defense is simply an instantiation of the lesser-evils calculus.<sup>13</sup> According to Kadish, the difficulty is in explicating how killing one person to save another is a lesser evil if we take the equality principle seriously.<sup>14</sup> Moreover, as he notes, the killing becomes harder to justify as a lesser evil when we recognize that deadly force may be used to defend against harms other than death (serious bodily harm, kidnapping, rape), when we try to account for the permissibility of killing *multiple* culpable aggressors to save one victim, and when we try to account for the killing of an innocent attacker.<sup>15</sup>

Kadish also rejects the move to rule-utilitarianism as both too broad and too narrow.<sup>16</sup> A rule justified by its deterrent effect could extend not only to defensive force but also to retaliatory force.<sup>17</sup> Conversely, Kadish complains that there is something wrong with saying that an innocent victim would not be permitted to kill a culpable attacker if in the long run such a killing would not result in greater deterrence.<sup>18</sup>

Next, Kadish turns to rights-based explanations. Here, too, Kadish finds theoretical difficulties. One problem is understanding how an aggressor can be said to “forfeit” his right to life.<sup>19</sup> This problem is especially vexing in the case of innocent aggressors.<sup>20</sup> Innocent aggressors are not responsible for their attacks so how can these attacks constitute a forfeiture of their rights? He also claims that just because an aggressor forfeits his right to life, this does not entail that the victim has the right to take it.<sup>21</sup> Finally, Kadish worries that this theory posits a

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<sup>12</sup> *Id.* at 881.

<sup>13</sup> *Id.* at 882–83. Within criminal law scholarship, Paul Robinson takes this approach to self-defense. See Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY 45, 46 (A.P. Simester & A.T.H. Smith eds., 1996) (“Force in self-defence may injure the aggressor, but the injury is outweighed by the societal value of the defensive force—in avoiding the threatened harm to the victim and in condemning and deterring unjustified aggression generally.”).

<sup>14</sup> Kadish, *supra* note 4, at 882.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 882–83.

<sup>17</sup> *Id.* at 883.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 883–84.

<sup>20</sup> *Id.* at 884.

<sup>21</sup> *Id.* But see DAVID RODIN, WAR & SELF-DEFENSE 75 (2002):

The aggressor’s right to life includes the claim against others that they not kill him. If the aggressor forfeits this right with respect to the defender then he has a no-claim against the defender that he not kill him. But this in turn is just to say that the defender has the right (liberty) to kill him. The absence of the aggressor’s right to life and the defender’s right to kill are thus internally connected by the logic of normative relations.

general right to life, but given criminal law's allowances for killings, Kadish believes we cannot possess such a right.<sup>22</sup>

In Kadish's view, "a more satisfactory rights approach" is "one that derives the liberty from a right against the state."<sup>23</sup> He claims:

That right . . . is the right of every person to the law's protection against the deadly threats of others. For whatever uncertainty there may be about how much protection must be afforded under this right, it must at least, if it is to have any content, include maintenance of a legal liberty to resist deadly threats by all necessary means, including killing the aggressor. . . . The individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority; this freedom is required by most theories of state legitimacy, whether Hobbesian, Lockean or Rawlsian, according to which the individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before. *This liberty to resist deadly aggression by deadly force, and the moral right against the state from which it derives, I will refer to as the right to resist aggression.*<sup>24</sup>

In other words, our right to self-defense comes from a right we have against the state. To understand why we may kill an aggressor, we look to the moral right to protection that individuals hold against the state.

According to Kadish, "the right to resist aggression" theory of self-defense has a number of virtues.<sup>25</sup> Because the citizen reserves the right to resist aggression, it "clearly follows" that he may resist an aggressor.<sup>26</sup> In addition, an account of how the aggressor's right to life is forfeited is not required—the theory does not posit a general right to life, just a right to resist another's aggression.<sup>27</sup> Moreover, because the citizen retains the right to repel aggressors, he may also kill innocent threats.<sup>28</sup> Kadish claims that his theory also explains why the right to self-defense only exists when the aggressor is threatening the defender because this is the only point at which aggression exists.<sup>29</sup> When the aggression ends, so does the right. Finally, the ability of third parties to intervene derives from the right of

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<sup>22</sup> Kadish, *supra* note 4, at 884.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 884–85 (emphasis added).

<sup>25</sup> *Id.* at 885–86.

<sup>26</sup> *Id.* at 885.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 885–86.

the defender because the defender's right to the state's protection would be undermined if the state prohibited third-party assistance.<sup>30</sup>

### B. *Assessing Kadish's Account*

Though Kadish does an exemplary job of pointing to current contradictions in our legal doctrine, his "right to resist aggression" cannot serve as the underlying principle he hopes to find.<sup>31</sup> The problem is that Kadish does not resolve the problem of explicating the content of the right to self-defense; he simply shifts the question.

On the Hohfeldian account of rights, the term "right" covers four different possibilities: claim-rights, liberties, immunities, and powers.<sup>32</sup> Of these meanings, the two likely possibilities for self-defense are claim-right and liberty. The correlative of a claim-right to self-defense is a duty on the part of another, for instance, a duty to act or a duty not to interfere.<sup>33</sup> Liberties, on the other hand, do not place a duty of non-interference on another. Rather, *X's* liberty to *a* simply means that no other person has a claim-right against *X* that he not *a*.<sup>34</sup>

Whether we conceive of self-defense as a Hohfeldian claim-right or merely as a liberty, there is a correlative on the part of another actor (in the case of the claim-right) or the world (in the case of a liberty). As self-defense is typically understood, this is a relationship between the aggressor and the defender. To explain self-defense, one must have an account of why the defender is entitled to kill the aggressor. That is, for some reason (self-defense's justification), the defender has a claim-right or liberty vis-à-vis the aggressor.

Unable to explain how a defender might be entitled to kill another, Kadish creates a different relationship by substituting one of the parties. He claims that the right to self-defense is a relationship between the defender and the state. This shift—from defender/aggressor to defender/state—is unsatisfactory for three reasons.

First, shifting from an aggressor/defender relationship to a defender/state does not tell us about the content of the right to self-defense. Substituting one of the parties does not explain the underlying content of the relationship. That is, saying

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<sup>30</sup> Later, he addresses additional complexities in our rules of self-defense because as we move from threats of deadly force to lesser threats, the principle of autonomy and the principle of proportionality may conflict. *Id.* at 886–87. These further nuances are not relevant for our purposes.

<sup>31</sup> For a general survey and critique of Kadish's account, see SANGERO, *supra* note 1, at 77–81.

<sup>32</sup> WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 37–64 (Walter Wheeler Cook ed., 3d prtg. 1964).

<sup>33</sup> *Id.* at 37–38. When translating Hohfeld's view of legal rights into an analysis of moral rights, it is unclear whether duty pertains to "duty not to" or "duty that." See WILLIAM A. EDMUNDSON, *AN INTRODUCTION TO RIGHTS* 94–95 (2004).

<sup>34</sup> HOHFELD, *supra* note 32, at 38–50.

that self-defense is a claim-right against the state instead of against the aggressor tells us nothing about why the defender may kill to preserve his life.<sup>35</sup>

Second, even if identifying a different party might, in some instances, cast a different light on the nature of the right, it does not do so here. Kadish's "right to resist aggression" remains undefined.<sup>36</sup> The most that Kadish has told us is that the state cannot punish us for this killing. But that does not answer any of the questions that Kadish sought to answer. Whatever the label, why is it that we should understand innocent *aggressors* as aggressing? Under what theory did the state grant us the right to kill a toddler pointing a gun at us?<sup>37</sup>

Third, even supposing there is an aspect of self-defense that should be understood as a citizen/state relationship, it simply cannot be the case that the aggressor drops out of the picture completely. Even if the state allows us to resist the culpable aggressor, does a victim wrong the aggressor by killing him?<sup>38</sup> In other instances, the state grants us a justification for taking the lesser evil, yet still requires us to compensate the victim of our actions.<sup>39</sup> However, there is something different about the relationship between the defender and the aggressor that leads to the conclusion that the defender need not compensate the culpable aggressor. But how are we to understand this relationship between the victim and the aggressor if the aggressor simply drops out of the picture on Kadish's account?

For these reasons, I think that Kadish has not provided a sufficient account of the right to self-defense and why it is permissible for us to take a life under certain circumstances. The purpose of this paper is not, however, to suggest an alternative account. Elsewhere, I have defended a different view of self-defense.<sup>40</sup> Here, however, I wish to explore whether and how viewing self-defense through the lens of the citizen/state relationship will illuminate the nature of self-defense. In the next sections, I explore the possibilities.

### III. SELF-DEFENSE: MORAL OR POLITICAL RIGHT?

Kadish claims that we can understand the right to self-defense by looking to the social contract with the state. Under this view, the prism of the social contract helps us to understand self-defense because self-defense is the right that we would

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<sup>35</sup> See RODIN, *supra* note 21, at 35 (rights have subjects, objects, and *contents*).

<sup>36</sup> See Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 321 (1989) (criticizing Kadish because "an explanation of why it is not wrongful to kill an aggressor in terms of a right to kill an aggressor comes perilously close to a tautology [and, what is needed] is some more general account of why we have such a right.").

<sup>37</sup> "If self-defense is a right against aggressors, it is a right against *culpable* aggressors only." David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 365 (1987) (criticizing Kadish for "making too much of the apparent right to kill blameless aggressors.").

<sup>38</sup> See also SANGERO, *supra* note 1, at 80 (discussing Arnold Enker's critique).

<sup>39</sup> See, e.g., *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910).

<sup>40</sup> See Ferzan, *supra* note 5.

reserve under the social contract. No man would or could abandon his right to self-defense.

In my view, however, the very intricacies of self-defense that Kadish sought to explore cannot be answered through this prism. While contractualist reasoning may assist us with understanding the morality of self-defense, the *political* aspect of the state cannot substitute for good moral arguments.

The immediate opposition to my view is that self-defense is part of the social contract tradition. Hobbes and Locke had views of self-defense as it related to the social contract.<sup>41</sup> Even today, theorists use the social contract to argue about how self-defense should be constructed,<sup>42</sup> and still other theorists engage in Rawlsian analysis of the right to self-defense.<sup>43</sup>

In this section, I explore these possibilities, ultimately claiming that self-defense should be understood as a moral, and not a political, right.<sup>44</sup> First, I argue that to make sense of traditional social contract theory, we must understand self-defense to be *pre-political*. It is a right that existed prior to the social contract. I next turn to modern arguments that self-defense serves to apportion power between the citizen and the state, and I argue that even in the absence of the state, a citizen must offer a moral argument for the resort to force. Finally, I turn to arguments by theorists who use Rawlsian analysis to explicate the content of the self-defense. I argue that such analysis is helpful as an expository device precisely because it may bring to light distributional questions that are obscured by some forms of moral analysis. Nevertheless, the right to self-defense falls first within moral, not political, philosophy.

#### A. The Social Contract Tradition: Hobbes and Locke

Self-defense lies at the heart of the social contract tradition. As Jeremy Waldron notes, “[f]or Hobbes, self-preservation lies at the heart of the social contract; for Locke, self-defense lies at the heart of the theory of justified revolution.”<sup>45</sup> Given the long association of the social contract with self-defense, moral philosophers’ disregard of the state in their theories of self-defense seems all

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<sup>41</sup> See *infra* Part III.A.

<sup>42</sup> See *infra* Part III.B.

<sup>43</sup> See *infra* Part III.C.

<sup>44</sup> My exploration is limited to contractarian/contractualist approaches for two reasons. First, this is the type of political theory of the state that Kadish himself employed. Second, other theorists who attempt to explain self-defense through political philosophy also rely on these approaches. Thus, though my account may not be exhaustive of all approaches, I hope that by rebutting the explanations that are most frequently offered, I have at least shifted the burden to those who wish to explain self-defense solely through political theory.

<sup>45</sup> Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711, 713 (2000).



the more perplexing. Indeed, the burden seems to lie with anyone who argues that the state does not play a role in his theory of self-defense.<sup>46</sup>

I will not engage in a lengthy exegesis of Hobbes or Locke here. Rather, my aim is simply to sketch out enough of their theories to demonstrate that whatever the relationship between the right to self-defense and the state, it is not that the social contract *constructs* the right to self-defense. Rather, self-defense is a pre-political moral (or amoral) right. The question of how the construction of the state intersects with such a moral right is an interesting one (and one I address in the next section), but the point here is that even under a Hobbesian or Lockean view, self-defense is not a right against the state. Rather, self-defense is a relationship that exists within the state of nature that is preserved through the social contract.

According to Hobbes, in the state of nature, all men are at war with each other, and in this condition, all men have a right to everything including each others' bodies.<sup>47</sup> And, because "every man has right to every thing[,] . . . no action can be Unjust."<sup>48</sup> In forming the social contract, man could not alienate the right to self-defense and retain the right to use deadly force against anyone, including a lawful executioner.<sup>49</sup>

Notably, even on this view, self-defense is pre-political. It is a right to do anything to anyone in the name of self-preservation. The right is a natural right, and it is a natural right that we do not (and could not) surrender.<sup>50</sup> We must understand self-defense—and understand human nature—to understand what we would contract to preserve. We learn about the content of the right counterfactually, but the contract itself does not define the right—it only recognizes it.<sup>51</sup>

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<sup>46</sup> Claire Finkelstein argues that Locke himself is responsible for the shift in focus from political to moral philosophy. Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 PAC. PHIL. Q. 332, 333 (2001) ("Locke set a precedent for overlooking a crucial question for any naturalistic account of the legal right to self-defense, namely the question of why the natural right to self-defense should carry over to civil society.").

<sup>47</sup> THOMAS HOBBS, *LEVIATHAN* 189–90 (C.B. Macpherson ed., Penguin Books 1985) (1651).

<sup>48</sup> *Id.* at 190, 202.

<sup>49</sup> *Id.* at 199.

<sup>50</sup> See Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 639 (1996).

<sup>51</sup> Notably, it is hard to accept Hobbes's view of self-defense as the best normative account of this right. Hobbes views self-defense as a liberty (or excuse) that includes a right to use bystanders. See generally *id.*; Waldron, *supra* note 45. However, as Kadish notes, we should query whether it is possible to construct a theory of self-defense that treats self-defense as a justification. The defender who kills a culpable attacker who is about to kill him seems to present a stronger claim than a claim of excuse. In addition, it seems that whatever reasons we have for allowing a defender to kill a culpable aggressor, these reasons would be significantly different from the reasons that we allow (if we ever do) an actor to kill (and especially to appropriate) a bystander. See also RODIN, *supra* note 21, at 22–23 ("There is, indeed, something very peculiar about the way Hobbes refers to universal liberties possessed by agents in the state of nature as rights. For, in what meaningful way can it be said that I have a right to life if this does not include any claims against others, for instance, that they not kill or attack me?").

There is another interpretation of Hobbes that does view the social contract as creating self-defense as a right held by the citizen against the state, but this view does not purport to answer why or under what conditions citizens may kill aggressors. In puzzling over how to understand Hobbes's argument that the right to self-defense is inalienable because no person could rationally regard himself as advantaged by giving up the right, Claire Finkelstein ultimately concludes, "the primary purpose of the right to self-defense is protection against an all-powerful sovereign."<sup>52</sup> That is, whereas it may be sensible to alienate one's right to self-defense against other citizens in exchange for the sovereign's protection, it would not be rational to give up one's right to rebel against the sovereign in the event that the sovereign breaches the social contract. What, though, of the right to self-defense when a defender is attacked by a culpable aggressor? Finkelstein answers:

Private citizens who act offensively are violating the terms of their Covenant. Thus arguably the right to self-defense is not required as against them, since they have placed themselves in a posture of war towards the rest of civil society. They might be attacked as covenant-breakers rather than as initiators of rights violations . . . . It might turn out, for example, that the correct sanction for covenant-breaking is expulsion from civil society, rather than death.<sup>53</sup>

Finkelstein constructs the Hobbesian position on self-defense as a political right against the state, but it is only that—a right to use violence against the state when the state is unable to protect citizens.<sup>54</sup> The account is a full account of not only the parties to this right—citizen and state—but also the content of the right. However, other individuals against whom one might exercise the right to self-defense are not covered by the social contract at all. Then, what may one do to an innocent aggressor who will otherwise kill you? As Finkelstein explicates this interpretation of Hobbes, the puzzle remains unresolved. We still need a good moral argument.

The Lockean view is also one in which the right to self-defense is a pre-political moral right. Locke made sense of self-defense in the state of nature. He argued:

[When someone declares] by word or action, not a passionate and hasty, but a sedate settled design, upon another man's life, [he] *puts him[self] in a state of war* with him against whom he has declared such an intention, and so has exposed his life to the other's power to be taken away by him, or any one that joins with him in his defense, and espouses his quarrel; it being reasonable and just, I should have a right to destroy that which

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<sup>52</sup> Finkelstein, *supra* note 46, at 357.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

threatens me with destruction: for, *by the fundamental law of nature, man being to be preserved* as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred . . . .<sup>55</sup>

Note that Locke claims that by “fundamental law of nature,” it is “reasonable and just . . . to destroy that which threatens my destruction.” Here, too, whatever gives the citizen the right to kill another person is not created by the social contract with the state. Rather a principle of fairness or justice underlies the right to self-defense.<sup>56</sup>

In summary, neither Hobbes nor Locke provide any support for the claim that the right to kill a culpable aggressor is a right created by the social contract. Rather, both theorists claimed that the right to self-defense existed in the state of nature. Hence, to justify self-defense against other citizens, we cannot rely on the social contract to justify it.

#### B. A Modern Perspective

The relevance of the social contract to the right to self-defense did not end with Hobbes and Locke. Rather, in analyzing current cases of self-defense, some theorists claim that these actions are best understood as a political power struggle between citizen and state—a struggle that is mediated through the doctrine of self-defense. In this section, I explore the claim that self-defense serves simply to partition power between the citizen and the state. I argue that, by looking at self-defense in instances in which the social contract appears to have been breached, we can see that self-defense is conceptually and normatively contained.<sup>57</sup>

The state reigns supreme on both boundaries of self-defense. “Legitimate self-defense must be neither too soon nor too late.”<sup>58</sup> When a citizen uses force too soon or too late, the citizen steps on the sovereign’s toes.

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<sup>55</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 14 (C.B. Macpherson ed., Hackett Pub. Co., Inc. 1980) (1690).

<sup>56</sup> As for Locke’s normative account of self-defense, there are competing interpretations. Jeremy Waldron reads Locke as striking “a chord congenial to our modern theories of ‘lesser evil.’” Waldron, *supra* note 45, at 734. He also finds Locke’s view of aggressors as somewhat akin to forfeiture. *Id.* at 734–35. In contrast, Daniel Farrell interprets Locke’s position on self-defense to be part of a more general view of the fair distribution of harms. Daniel M. Farrell, *Punishment Without the State*, 22 *NOÛS* 437 (1988). On this view, both punishment and self-defense are separate instantiations of the same distributive principle.

<sup>57</sup> I do make the important assumption that desert is, at the very least, a limiting principle for the just imposition of punishment. If all we are doing through preemption, punishment, and self-defense is calculating consequences, then there may not be any boundary between these concepts. However, there are reasons to reject consequentialism as the sole justification of punishment or self-defense.

<sup>58</sup> George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 *U. PITT. L. REV.* 553, 556 (1996).

One boundary for self-defense is the difference between preemption and legitimate acts of defensive force.<sup>59</sup> Citizens may not act until an attack is imminent. A citizen may not preemptively kill someone whom she believes may harm her in the future.

In contrast to the citizen, the state can and should act before an attack is imminent. The state devotes resources to prevent the occurrence of crime. It enacts statutes both to inform the citizenry as to what type of behavior is prohibited and to instill appropriate social norms. The state's police investigate the planned commission of crimes; they can enforce a restraining order that prevents a crime; and, in limited cases, they can preventatively detain dangerous actors. Of course, there are limits to the actions the state can and should take, but the state plays a significant role in preventing crime.

After a crime, it is not the role of the citizen to punish.<sup>60</sup> States punish wrongdoing. Moreover, it is the state that provides the necessary procedural protections to make sure that punishments are not only just but also fair. Our concerns for fairness may limit the reach of the state, but our system is intentionally designed to favor freeing the guilty over convicting the innocent.

Because self-defense is bounded on both sides by state power, one might think that the doctrines of self-defense *mediate* that power. Indeed, theorists have claimed as much. For instance, George Fletcher argues that the purpose of imminence is to allocate authority between the citizen and the state:

[W]hen an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary. Individuals do not cede a total monopoly of force to the state. They reserve the right when danger is imminent and otherwise unavoidable to secure their own safety against aggression.<sup>61</sup>

Victoria Nourse also takes this view:

[T]he doctrine of defenses is constructed as much to avoid private punishment ("taking the law into one's own hands") as it is to reflect a particular view of defendants' individual character or choice or self-control. This is manifested nowhere more clearly than the standard requirement of defenses that the state be unavailable—a requirement that demands deference to the state's monopoly on violence. For example, the doctrine of self-defense insists that the threat be so imminent as to

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<sup>59</sup> *Id.* at 557.

<sup>60</sup> *Id.* at 558 ("Private citizens cannot function as judge and jury toward each other.").

<sup>61</sup> *Id.* at 570.

prevent lawful recourse and often emphasizes this fact by requiring retreat.<sup>62</sup>

This method for understanding self-defense sees it as a device for allocating the right to use violence between citizen and state.<sup>63</sup> The boundaries of self-defense are thus critical because they define the role of citizen and the role of state. They inform our understanding of when it is permissible to use deadly force.<sup>64</sup>

I think we should carefully examine the nature and implications of these claims. To do so, I suggest that we ask the following question: Does the state's failure to protect *alter* the legitimate boundaries of self-defense? Put another way, if we are to assume that within the social contract we gave up the ability to use force except within the limited scope of self-defense, then one might expect that where there is a state failure, self-defense would seep in to fill in the cracks. If self-defense does not have its own normative and conceptual boundaries, nothing will contain it.

By analyzing the cases of Bernhard Goetz and Judy Norman, it becomes apparent that self-defense does not fill in the cracks of state failure. That is, even if we believe that defendants have legitimate claims for the use of force, they are not claims of self-defense. We scrutinize preemption, self-defense, and punishment differently.

Bernhard Goetz was the "subway vigilante."<sup>65</sup> A victim of previous muggings, Goetz shot four youths on a New York subway when one of them asked

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<sup>62</sup> V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1725 (2003).

<sup>63</sup> Whitley Kaufman argues that imminence partitions power whereas other self-defense limitations are morally based. See Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 354 (2007) (making precisely this claim). However, the availability of the state to intervene prior to a threat becoming imminent is what renders the killing unnecessary. Thus, it is difficult to see how imminence can be a political restriction, but necessity a moral one. Indeed, Kaufman's ultimate claim is not truly about the *authority* to use violence, but about the potential of an individual to miscalculate, thus necessitating a clear imminence rule. I discuss these sorts of rules/standards difficulties *infra* Part V.B.

<sup>64</sup> One other possibility is that when the citizen acts in self-defense, he is performing an act of state. For a discussion of this early understanding of self-defense, see Finkelstein, *supra* note 50, at 638. If self-defense is simply an act of state, then it is the defender whose relevance drops out of the picture. Then, self-defense is about the relationship between the state and the aggressor. I find this view implausible because from this perspective, the defender's right to self-defense has nothing to do with the *defender*. Such a view also does not explain why the individual may only act in the name of the state when he acts in self-defense; that is, it does not explain why he cannot take on other law enforcement duties. Notably, there are theorists who view the aggressor's attack as both an attack on the defender and an attack on the socio-legal order. See SANGERO, *supra* note 1, at 99 ("Private defence is, simultaneously, a defence both of the autonomy of the person attacked and of the social-legal order, by means of essential and reasonable defensive force against the aggressor who is criminally responsible for his attack."). I cannot address these views here.

<sup>65</sup> See generally GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988).

him for five dollars.<sup>66</sup> As Victoria Nourse notes, “[p]eople feel very strongly about the *Goetz* case”;<sup>67</sup> they champion or condemn Goetz for “taking the law into his own hands.” As Nourse claims, Goetz’s references to previous muggings can be understood as a claim that the state had previously failed to protect Goetz and thus he needed to protect himself.<sup>68</sup>

Judy Norman married her husband J.T. when she was fifteen because she was pregnant.<sup>69</sup> Five years later, J.T. began to abuse Judy.<sup>70</sup> His conduct ranged from degrading her by forcing her to eat dog food, to forcing her to earn their only income by working as a prostitute, to brutally beating her.<sup>71</sup> When Judy tried to leave, J.T. would find her, take her home, and beat her.<sup>72</sup> After a failed suicide attempt, Judy obtained a gun and shot her husband three times in the head while he was sleeping.<sup>73</sup>

Some theorists argue that the state’s failure to protect women such as Judy Norman constitutes a breach of the social contract. Indeed, one commentator goes so far as to argue that battered women are justified in killing their abusers because they are acting as vigilantes: “The battered woman who kills her abuser should be seen as a spontaneous vigilante, a defender of justice, one repairing the moral order where the state has failed to do so.”<sup>74</sup>

There is no such claim as a “breach of social contract,” and thus, these cases are forced within the doctrinal rubric of self-defense. Goetz was not charged with “breaching the social contract.” The issue was whether he committed attempted murder or an act of self-defense.<sup>75</sup>

Some commentators bemoan the pretext of such self-defense claims. They claim the doctrine is being inappropriately bent in favor of sympathetic defendants. George Fletcher argues, “[b]ut however tragically Judy Norman’s appeals to the authorities went unheeded, she cannot put herself in the position of judge and executioner.”<sup>76</sup> And, James Whitman argues, “[s]ince we reject the legitimacy of

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<sup>66</sup> *People v. Goetz*, 497 N.E.2d 41, 44 (N.Y. 1986).

<sup>67</sup> Nourse, *supra* note 62, at 1704.

<sup>68</sup> *Id.* at 1706–07.

<sup>69</sup> The abuse that Judy suffered and the events leading up to J.T.’s death are recounted in both the appellate and supreme court opinions. *State v. Norman*, 378 S.E.2d 8, 10 (N.C. 1989); *State v. Norman*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988). The fact that Judy was pregnant and barely fifteen at the time of the marriage is only mentioned in newspaper reports. See Jeri Fischer, *Pulled the Trigger*, CHARLOTTE OBSERVER, Mar. 20, 1988, at 1E.

<sup>70</sup> *State v. Norman*, 378 S.E.2d 8, 10 (N.C. 1989).

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.* at 9.

<sup>74</sup> Elisabeth Ayyildiz, *When Battered Woman’s Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 149 (1995).

<sup>75</sup> Notably, Ayyildiz argues for jury nullification, not for the expansion of self-defense. *Id.* at 164–65.

<sup>76</sup> Fletcher, *supra* note 58, at 556.

vengeance, we compel actors who have committed violent acts to justify or excuse those acts in the language of 'self-defense.'"<sup>77</sup> Whitman dubs this "self-defense hypocrisy."<sup>78</sup>

Nevertheless, let us ask what it would mean to get beyond the "hypocrisy."<sup>79</sup> What would it mean to take the claim that the state has failed seriously? And, specifically, what are the implications for self-defense? If self-defense is simply the power to use violence, then when the state fails, this subset should fill the cracks.<sup>80</sup>

So, let us assume that there is a crack at the self-defense/punishment boundary. Assume the state failed both Goetz and Norman. Does this change our understanding of self-defense? I think not.

Even if the state had previously failed Goetz, how does this convert his act from illegitimate to legitimate self-defense? Rather, it seems that whether Goetz acted appropriately turns on Goetz's beliefs about whether those four youths really were going to rob or kill him. To the extent that the claim is that the youths "got what they deserved," we must then ask whether, in fact, those youths—whatever their criminal enterprise—deserved to be shot at with deadly force.

Indeed, one way to see that there is still a clear distinction between self-defense and punishment is to analyze the difference in proportionality. Under current law, more force may be used to prevent harm than may be used to punish. Deadly force is permissible to defend not only against a deadly attack but also against kidnapping, rape, and robbery. Theorists may have difficulty explicating

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<sup>77</sup> James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 902 (2004).

<sup>78</sup> *Id.* at 908–09.

<sup>79</sup> Initially, one might question whether there is any hypocrisy here. One might argue that *Goetz* is a case about self-defense. Was he justified? Conversely, should he have been excused? And, there are certainly reasons to debate whether Judy Norman was excused or justified in acting against a non-imminent attack. Indeed, what is striking is that there is something almost insulting about labeling an actor such as Norman, a "vigilante." Unlike the Menendez brothers, about whom George Fletcher says, "[i]f they motored their way to San Diego to buy a shotgun, they could find their way out of their silver-lined unhappiness" (Fletcher, *supra* note 58, at 574), there is no doubt that Norman faced a future of prolonged and tragic abuse. Norman did not walk out the door, buy a shotgun in another state, and return to shoot J.T. in the head, claiming, "the bastard had it coming." J.T.'s vicious actions may not have justified the use of deadly force against him while he was sleeping, but it oversimplifies our inquiry and demeans these abused women to claim that these are simply instances of exacted vengeance.

<sup>80</sup> James Whitman argues that current attempts to construct political theories of self-defense conflate social contract theories with monopoly of violence theories. Whitman, *supra* note 77, at 903. According to Whitman, an understanding of Locke, Kant, and even Hobbes, yields only that one may act to defend oneself from an attack. *Id.* at 915. This is a "pacifist" social contract theory. On the other hand, a monopoly on violence theory begins with a natural right to vengeance. *Id.* at 903. That is, a right therefore not just to harm another when attacked, but a right to harm another to exact revenge. Because I am considering precisely the argument that the social contract is one that gives the state a monopoly on violence, and without the contract, different types of violence are indistinguishable, I am intentionally conflating these two versions of the social contract.

exactly why we believe that deadly force may be used to prevent crimes such as rape, but there is little doubt that that intuition is deep-seated.<sup>81</sup>

In contrast, when we are punishing someone, we believe that the offender must deserve his degree of harsh treatment. The significant opposition to the death penalty stands in stark contrast to our intuitive acceptance of the use of deadly force in self-defense. Moreover, it is unconstitutional to execute someone for rape,<sup>82</sup> and it is beyond the pale to think we would execute someone for robbery or kidnapping. So, though one might be tempted to say that Goetz gave the youths “what they deserved,” in no sense was this sort of vigilante justice an act of retributive justice. Goetz’s act is morally permissible if and only if it fell within our best theory of self-defense, and even in the absence of a state, we still need that account.

This is likewise true for Norman. It is critical to ascertain whether her use of force was to *defend* against a future attack or to *punish* a past attack. If we believe that Norman justly acted in self-defense, then her use of deadly force was justified. If we believe that she is punishing her husband for prior attacks, then *even if she was justified in stepping into the shoes of the state*, her use of force may be criticized for having been disproportionate. If one thinks the death penalty is a disproportionate penalty for horribly beating one’s wife, then one should think that the battered woman acts unjustly by killing him.

Although the critique of Goetz and Norman is that both sought to cloak *punishment* as self-defense, we might also ask whether the state’s failure altered the other boundary—that between *preemption* and self-defense. Some scholars argue that it was necessary for Judy Norman to kill her husband while he slept—even if the attack was not imminent—because she could not rely on state protection.<sup>83</sup> This claim might then be interpreted this way: the boundary between state preemptive power and the use of self-defense shifts when the state is unable to fulfill its law enforcement role.

Here, too, however, even in the absence of the state, there is a line between preemption and punishment. This is apparent when we look at our war with Iraq. When we question whether the United States’s attack on Iraq was “preemptive war” or a “legitimate act of self-defense,” we are acknowledging that not any act is self-defensive simply because it is preemptive. Indeed, even a critique that the United States cloaked aggression as self-defense presupposes that there is a proper way (and an improper way) to understand self-defense. Conversely, the argument that imminence is not the proper normative threshold is still an implicit acknowledgement that there *should be* a threshold.

The Norman case may also be viewed through the prism of preemption versus self-defense. For Norman, the critical question is whether she had to wait until the threat was imminent. The political claim is that imminence restricts the citizen’s

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<sup>81</sup> See LEVERICK, *supra* note 1, ch. 8.

<sup>82</sup> Coker v. Georgia, 433 U.S. 584 (1977).

<sup>83</sup> See sources cited *infra* notes 127 & 129.



power to use force, giving the state an almost complete monopoly on violence.<sup>84</sup> There are two problems with this view. First, it ignores those instances in which the state is unavailable even prior to the attack becoming imminent.<sup>85</sup> Second, and importantly for our purposes, it ignores another role that imminence plays. Imminence delineates those types of attacks that constitute aggression that trigger the right to self-defense. In this respect, imminence serves as the *actus reus* of aggression. In so doing, imminence serves to mediate the risk between the aggressor and the defender. The longer the defender has to wait, the less likely it is that she will be able to protect herself.<sup>86</sup> Notably, whether imminence strikes the correct balance is a moral question of how we should apportion this risk between the aggressor and the defender, not a political question about the defender and the state.

In summary, I have tried to show that the doctrine of self-defense does not simply serve to partition the use of violence between the state and the citizen. Some theorists have argued that self-defense lies at the boundaries of a political power struggle. I have sought to demonstrate, however, that these boundaries may not be easily shifted, thus demonstrating that self-defense has contours of its own. Even if we could shift the authority to use violence to the citizen from the state, the normative grounding and conceptual boundaries of self-defense seem to hold constant. Thus, we will make little progress trying to understand why a defender may kill a culpable aggressor by viewing self-defense through the prism of a political power divide.<sup>87</sup>

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<sup>84</sup> See Kaufman, *supra* note 63, at 354.

<sup>85</sup> See Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 586 (1996) ("The more difficult proposition is that in cases where objective imminence does not exist, self-defense should not be permitted. Fletcher has said little explicitly in support of this latter proposition.").

<sup>86</sup> Jeremy Horder, *Killing the Passive Abuser: A Theoretical Defense*, in CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 283, 292 (Stephen Shute & A.P. Simester eds., 2002).

A strictly construed imminence or immediacy requirement is the optimum rule for aggressors in general. It shifts the burden of risk (the defendant may lose a chance to make a pre-emptive strike, or may lose the chance to incorporate a necessary element of surprise in his or her response, and so forth) on to the defender. It shifts the burden in this way by insisting that defenders stay their hand until it appears there can be no reasonable doubt about the putative aggressor's intentions.

*Id.*

<sup>87</sup> There is, admittedly, a sense in which I have assumed what I have been trying to prove. One might argue that if I assume that self-defense is conceptually and normatively bounded, then when I erase a boundary, well, of course, self-defense will remain bounded: I have simply assumed my conclusion. I hope that this is not the case. Rather, what I have attempted to demonstrate through these thought experiments is that we would categorize and justify the use of violence differently depending upon its purpose. Perhaps without a state at all, there would be no reasons, only violence, and perhaps that is how some view the current state of international law. But, I believe that I have shown that we can understand self-defense even without a state to bound it. And thus, our best account of self-defense is not one that views it as simply a way to partition power.

*C. Rawlsian Reasoning*

Although Hobbes and Locke are the social contract theorists who figure most prominently in discussions of self-defense, Kadish also sees his view as consistent with the social contract theory of John Rawls, and thus, we should spend a moment on how Rawlsian reasoning might elucidate the right to self-defense. Although I am skeptical that such reasoning can account for all of the nuances of the right, it does serve to illuminate some otherwise hidden distributive questions.

Though Rawls's view of "justice as fairness" is well known, let me set forth his brief description here:

In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.<sup>88</sup>

Behind the veil of ignorance, we might ask what rights we would wish to have against others when we act in self-defense. So, for instance, Stephen Morse questions whether preemptive strikes should be justified in instances where it is unreasonable to wait for an attack to be imminent. He asks, "[b]ehind the veil of ignorance, would not we all agree to limited, humane preemptive strikes for the safety of all?"<sup>89</sup>

In my view, within substantive criminal law theory, this sort of move to the veil of ignorance is often more akin to contractualist moral reasoning than it is to an understanding of citizen and state. The veil of ignorance is a useful expository device because it gives us a way to think about how we should treat each other. But the answer to these questions lies not with any aspect of the *state* but with a deeper understanding of the very moral questions we seek to answer. Perhaps we

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<sup>88</sup> JOHN RAWLS, A THEORY OF JUSTICE 11 (5th prtg. 2003).

<sup>89</sup> Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 296 (1999).

think that the right to kill culpable aggressors is an act for which the state should commend us. Killing an innocent attacker, on the other hand, might be an act for which we would want to be *excused*. Indeed, I suspect that we would all wish to reserve the right under the social contract to commit the greater evil when it is necessary to save a loved one. The mere fact that we would want to reserve all three of these “rights” does not tell us what to justify, what to excuse, when third parties may intervene, when force must be proportional, and the like.<sup>90</sup>

However, Rawlsian reasoning is extremely helpful in revealing distributional questions that may be obscured by other forms of moral analysis. For instance, Ben Zipursky has forcefully argued that disparities in power between men and women could affect whether behind the veil of ignorance, one would be willing to endorse an imminence requirement.<sup>91</sup> That is, would we pick an imminence requirement in a society in which women are unable to protect themselves if they wait for an imminent attack and it is equally likely that one may be a man or a woman? Zipursky demonstrates, through the lens of Rawlsian reasoning, that the current system may not be the one that it is rational for one to select from behind the veil of ignorance.<sup>92</sup> And, of course, gender disparities are not the only potential distributional inequities that might affect our views of self-defense.<sup>93</sup>

In summary, quite often the nod that theorists give to the “veil of ignorance” is simply a method for exploring moral questions through a contractualist lens. But the Rawlsian framework is itself important in one respect—it requires that one focus on these distributional inequities. The Rawlsian framework, therefore, may reveal that a seemingly fair moral principle is only just and fair when the parties equally share the risk.

#### IV. THE INTERSECTION OF MORAL RIGHT AND POLITICAL THEORY

To this point my aim has been to refute Professor Kadish’s claim that self-defense is a right held by the defender against the state. In other words, self-

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<sup>90</sup> Cf. SANGERO, *supra* note 1, at 81 (“It would appear that extending the scope of the right that was reserved by individuals for themselves with the establishment of the state may lead to innumerable additional implications, as diverse and as strange as the author’s imagination may allow.”).

<sup>91</sup> Zipursky, *supra* note 85, at 589–93.

<sup>92</sup> *Id.* at 593 (“[T]he best answer is sensitive to the extent of domestic violence in society, to the pervasiveness of physical and psychological domination in relationships between men and women, and to the nature of the domination.”).

<sup>93</sup> See, e.g., Larry Alexander, *Self-Defense, Justification, and Excuse*, 22 PHIL. & PUB. AFF. 53, 58 (1993) (criticizing Judith Thomson’s claim that one may kill an innocent aggressor because of her failure to take into account the probabilities of an individual being the victim as compared to an aggressor, and questioning whether Thomson would reach the same conclusion if “everyone had a 1-in-500 chance of becoming an innocent aggressor who is killed in self-defense if self-defense were permitted, and a 1-in-1000 chance of being a victim of an innocent aggressor if killing innocent aggressor is not permitted.”).

defense is not merely a political right; it is a moral right. Moral theorizing is necessary to understand when a defender is justified in harming an aggressor.

Nevertheless, we should acknowledge that self-defense does not exist only within the domain of moral philosophy. That is, in contrast to how the concept of “beauty” may remain within the domain of aesthetics, self-defense is a criminal defense recognized by the state. Hence, even if self-defense is morally justified, the question remains how and why the state should recognize self-defense.

This section explores two aspects of that intersection. First, I take on George Fletcher’s claim that “the political precedes the moral” and thus one cannot answer any questions about the law’s view of self-defense until one has a theory of the state. I argue that one may ask the moral and political questions independently, that one is not prior to the other, but that both questions must ultimately be answered. Second, I consider the relationship between self-defense and the state’s legitimacy, ultimately concluding that Kadish’s true insight was not about the content of the right to self-defense but about what a state owes its citizens.

#### A. *The Theory of the State and the Theory of Self-Defense*

“[T]he political precedes the moral. It is only when a political theory makes reference to a moral question that the latter can become relevant in the criminal law.”<sup>94</sup> In his recent book, George Fletcher continues to urge criminal law theorists to look at criminal law doctrines through the lens of political, not moral, philosophy.<sup>95</sup> According to Fletcher, the content of legal rules under a perfectionist theory of the state will differ from the content of legal rules under a liberal or libertarian theory of the state.<sup>96</sup> Stephen Schulhofer has rejected this claim, arguing that, “[c]ompeting theories of the state rarely yield discrete, incompatible prescriptions for concrete cases.”<sup>97</sup>

Adjudicating these competing claims is difficult because, as Fletcher notes, there is little discussion of how political philosophy bears on substantive criminal law. Any attempt to look at self-defense through the prism of liberal theory in contrast to, say, perfectionist theory, requires a significant deal of speculation as to how the details would work out. Still, as I wish to defend the claim that the political is not *prior* to the moral, I believe even speculating will be instructive.

Consider the right to self-defense against innocent threats. How should a liberal state treat an individual who has killed a five-year-old pointing a loaded gun

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<sup>94</sup> GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, & INTERNATIONAL* 154 (2007).

<sup>95</sup> *Id.* at ch. 4; see also Fletcher, *supra* note 2.

<sup>96</sup> See Fletcher, *supra* note 2, at 700 (“The political theory we choose will invariably shape our answers to innumerable questions about what should be punished, when nominal violations are justified, and when wrongdoing should be excused.”).

<sup>97</sup> Stephen J. Schulhofer, *The Mathematician, the Monk, and the Militant: Reflections on the Role of Criminal Law Theory*, 88 CAL. L. REV. 705, 707 (2000).

at him? It seems as though, at the very least, a liberal state should excuse the killing of an innocent aggressor because the defender in such a case has lived up to all we can reasonably expect of him.<sup>98</sup>

In constructing a perfectionist state, we might ask what virtues the state would wish to inculcate. A perfectionist state might value self-sacrifice, particularly when the threat to one's life is an innocent person. In such cases, it seems unlikely that a perfectionist state would view killing innocent people as the right or permissible thing to do. In addition, one may even doubt whether such a defensive killing would even be excused. Under such a state, a hard-choice excuse that offers a concession to human frailty might not be available.<sup>99</sup> Thus, it seems that there might not be *any* defense of self-defense against an innocent aggressor in a perfectionist state.

What conclusions can we draw from these potentially disparate results? First, it seems that in some cases, if there is a different political theory at work, then the content of the criminal law will change. A liberal state's view of self-defense could depart substantially from that of a perfectionist state. However, I do not think such a conclusion implies that we should necessarily study these differing political approaches. Liberals have often used the fact that a policy seeks to perfect character as grounds for criticizing that policy. Hence, it is unclear whether criminal law scholars need more than a working background presumption of the liberal state. Any individual who seeks to look through a different political prism must defend it first.

Second, I think it is too quick to conclude that all the work here is being done by the political theory and not a moral one. After all, we need a theory of what is virtuous and how we should perfect character before we can build a perfectionist state. Thus, the perfectionist political theory will once again need to turn to moral philosophy to determine the ultimate content of the criminal law.

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<sup>98</sup> See generally Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475 (1999) (arguing that killing innocent aggressors should be excused); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1367 (1989) ("duress is a normative excuse that ought to exculpate anyone who is a victim of a threat that a person of reasonable moral strength could not fairly be expected to resist").

<sup>99</sup> It is difficult to construct how a perfectionist state would conceive of justifications and excuses. See generally R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147 (2002). Admittedly, perhaps the leading proponent of virtue theory, Kyron Huigens, believes that duress-type excuses would be available under such a theory. See Kyron Huigens, *Duress is Not a Justification*, 2 OHIO ST. J. CRIM. L. 303, 311 (2004). However, although Huigens claims that it would be hypocritical for "the majority" to punish a defendant who displayed the same degree of self-control that the majority could display, *id.*, and Duff claims that it would be unreasonable for a state to demand more courage and moral strength, Duff, *supra*, at 176, a state could plausibly adopt a virtue-consequentialist position where it sought to maximize overall virtue by punishing those who displayed only an ordinary degree of self-control. Cf. Dressler, *supra* note 98, at 1369 (defending a minimum standard for duress against a more demanding perfectionist view).

Third, and most importantly, one can try to understand the right to self-defense from the perspective of virtue theory without first resorting to a theory of the state. Even in current debates about self-defense, theorists have sought to understand whether consequentialist or deontic reasoning is at work in justifying the right. We can certainly add virtue theory as a candidate for study.<sup>100</sup> Once we have that understanding of self-defense we can filter it through the political prism of the state. Hence, if we believe that a particular practice is aimed at promoting virtue, but we believe that it is not within the province of the state to promote virtue, then this would be grounds for arguing that the state should not adopt that practice. If we have a square-peg moral theory and a round-hole political theory, one or the other will have to be reconsidered.

In summary, it seems as though our understanding of criminal law's theory of self-defense will ultimately depend upon a match of our best moral account of self-defense with our best political theory of the state. Although Fletcher is certainly correct that criminal law theorists are more interested in the first question than the second (and perhaps we do neglect political theory), it does not follow that our best account of self-defense is dependent on our best account of the state. We can understand the right to self-defense solely within the rubric of moral theory. Of course, when the criminal law seeks to implement this moral theory, the moral account of self-defense will have to be reconciled with our theory of the state. This inquiry, however, is true for the entirety of the criminal law. There is nothing special about self-defense and the state in this regard.

### *B. Self-Defense and the State's Legitimacy*

Although I have argued that Kadish's construction of the right to self-defense is ultimately unsatisfying, there is a real insight in Kadish's analysis of self-defense and the social contract. Ultimately, the point that Kadish actually makes is not a point about self-defense, but a point about the state. It is not that we can understand the morality of self-defense through the social contract prism. Rather, it is that we can evaluate the legitimacy of the state through the prism of self-defense.

Depending upon our best conception of self-defense, the state may or may not have any *moral* obligation to extend the right to its citizens.<sup>101</sup> If self-defense is a claim-right, where the state owes a duty of no interference, then the threat of punishment would be an interference, and thus, the state would have an obligation to grant the defense. On the other hand, to the extent that self-defense is a mere permission (or liberty), the state may not have any correlative duty not to interfere,

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<sup>100</sup> I find such a theory rather implausible. But the point, is we do not need the state to have this debate.

<sup>101</sup> See Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361 (1999).

in which case punishment would be morally permissible.<sup>102</sup> Under this analysis, the state does not act as a party to the right and duty, but rather as a bystander.

Despite its (possible) bystander status, we have grounds for criticizing the state when it does not grant us the right to self-defense. Imagine that a state did not allow citizens to use deadly force against culpable attackers. It is hard to believe that such a state would last for long. Citizens would have no reason to defer to an institution that failed to protect them. They would have no reason to leave the state of nature.<sup>103</sup> As Claire Finkelstein explicates the Hobbesian view, “self-defense provides the very condition for the willingness of individuals to leave the state of nature, and the scope of the duty to the sovereign is limited by the latter’s ability to fulfill that purpose.”<sup>104</sup> Thus, Kadish is entirely correct when he argues,

[t]he individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority; this freedom is required by most theories of state legitimacy, whether Hobbesian, Lockean or Rawlsian, according to which the individual’s surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before.<sup>105</sup>

The import of this claim, however, is not that we can understand self-defense through the prism of the state, but rather, that we can understand the state’s legitimacy through the prism of self-defense.<sup>106</sup>

Indeed, it is within the framework of state legitimacy that we can understand the claims of urban minorities who seek to “take the law into their own hands.”<sup>107</sup> Here, it is not that the state does not extend the right to self-defense, but that the state fails to protect urban residents. When the state fails to live up to its obligation to protect, then, we might question the state’s legitimacy vis-à-vis these groups. Still, in this context, the state is not changing the boundaries of self-defense. Rather, the argument is that the state’s failure relieves individuals of the obligation to obey the law. As we have seen with the discussion of Goetz and Norman, we must still ask, however, whether any given use of force is morally permissible.

The problem of legitimacy might also arise in the case of an individual. The argument would run that the failure to protect an individual leads to a quasi-

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<sup>102</sup> See *id.* at 1364–78. “A mere permission does not compel anyone, least of all the State, to respect conduct in its exercise.” *Id.* at 1394.

<sup>103</sup> *Id.* at 1397.

<sup>104</sup> Finkelstein, *supra* note 50, at 636.

<sup>105</sup> Kadish, *supra* note 4, at 885.

<sup>106</sup> Nourse, *supra* note 62, at 1710.

<sup>107</sup> See Bill Lawson, *Crime, Minorities, and the Social Contract*, 9 CRIM. JUST. ETHICS 16 (1990).

estoppel argument against the state. For example, consider Arthur Ripstein's "equal protection" argument in the context of battered women.<sup>108</sup> Ripstein discusses Nellie Eyapaise, who after being gang raped at twelve and then later subjected to a number of abusive relationships, overreacted to sexual advances by a man and stabbed him. Ripstein seeks neither to justify nor to excuse Eyapaise's behavior. "Indeed, she is not relieved of responsibility at all. Instead, the state having failed her has no business punishing her."<sup>109</sup>

This approach is not a claim that Eyapaise's behavior took the form of either preemption or punishment. Rather, Ripstein presents an alternative perspective regarding self-defense and the state: when a state fails in its obligations to its citizens, it may lack standing to punish. Of course, the problem is how far this argument goes, and whether Ripstein provides a principled distinction between Eyapaise's behavior and that of criminals who claim to have had rotten social backgrounds.<sup>110</sup> I cannot explore those issues here. At this point, it is sufficient to say that even with regard to the individual citizen, the state may be obligated either to protect him or to allow him to protect himself. (The use of force must still be morally justified, however.)

#### V. THE INTERSECTION OF MORAL RIGHT AND LAW

To this point, I have argued that self-defense is a moral, not a political, construct. I have then examined the intersection of this moral right with the state. I have argued that both a theory of the state and a moral theory of self-defense are required to understand how a state might recognize the right to self-defense. I have also concluded that the state's failure to recognize the right to self-defense (and to otherwise protect its citizens) may undermine the state's legitimacy.

There is one final way to look at the right to self-defense and the state, and this is through the prism of law itself. If the state is going to recognize the right to self-defense, how will "legal" concerns shape our understanding of the right to self-defense?

Before answering this question, we should put to the side one answer that is true, but trivially so. Of course, the state grants the defense of self-defense, and so, whatever the state says self-defense is, well, that is what it is. Moreover, because the state charges people, tries them, and jails them, the state has quite a bit of interaction with individuals who claim self-defense.

This sort of analysis is true of any aspect of the criminal law, however. For instance, the state, in this sense, decides whether to recognize the voluntary act requirement. But, of course, our best understanding of voluntary human action is

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<sup>108</sup> Arthur Ripstein, *Self-Defense and Equal Protection*, 57 U. PITT. L. REV. 685, 686 (1996) ("Punishment may sometimes be inappropriate because the law's failure to treat a woman as an equal by protecting her from past abusers is implicated in her reaction to her situation.") .

<sup>109</sup> *Id.* at 711.

<sup>110</sup> *Id.* at 721-23.



not simply whatever the state says that it is. We might ask first what a voluntary act is and why it should be required. The further appropriate legal questions would then be whether the Constitution demands such a requirement and how laws should be drafted. These questions are interesting. To simply point to the Model Penal Code's section on the voluntary act requirement and state, "see, the state requires one," is not.

In this section, I begin by examining self-defense as a *constitutional* right. I argue that we should not be too quick to conclude that the any right to self-defense embodied in our Constitution will perfectly mirror our best moral theory of self-defense. I then turn to how the moral right of self-defense may need to be filtered through the practicalities of legal rule drafting.

#### A. A Constitutional Right to Self-Defense?

Consider the following points about self-defense as a matter of constitutional law. First, it seems unimaginable that there is not a constitutional right to act in self-defense.<sup>111</sup> Second, there does not seem to be any clear answer as to where one might find it. Does it underlie the Second Amendment's right to bear arms?<sup>112</sup> Is it within the Ninth Amendment's unenumerated rights?<sup>113</sup> Or, will self-defense find its home within substantive due process?<sup>114</sup>

Third, depending upon where the right is located, it may have significant implications for the *content* of that right.<sup>115</sup> The implications of the right to self-defense depend on the nature of that right. Let me briefly examine two examples. First, in a recent article in the *Harvard Law Review*, Eugene Volokh argues that the right to self-defense extends to the right to payment for organs.<sup>116</sup> Second, questions about gun control are inextricably intertwined with how we interpret the Second Amendment.<sup>117</sup>

First, let us examine Volokh's constitutional claim. Volokh seeks to equate the following four acts as instances of self-defense:

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<sup>111</sup> See *Griffin v. Martin*, 785 F.2d 1172, 1187 n.37 (4th Cir. 1986) ("It is difficult to the point of impossibility to imagine a right in any state to abolish self-defense altogether . . .").

<sup>112</sup> See Nicholas J. Johnson, *Self-Defense?*, 2 J. L. ECON. & POL'Y 187, 188–93 (2006) (discussing this possibility).

<sup>113</sup> See *id.* at 193–96 (discussing this possibility).

<sup>114</sup> See *id.* at 196–99 (discussing this possibility); see also Nelson Lund, *A Constitutional Right to Self Defense?*, 2 J. L. ECON. & POL'Y 213, 218–20 (2006) (commenting that this is the most likely candidate of those surveyed by Johnson).

<sup>115</sup> See Lund, *supra* note 114, at 216 ("As a practical matter, it is probably going to be much more important, and much more difficult, to agree on the *scope* of the right to self defense.").

<sup>116</sup> Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007).

<sup>117</sup> Petition for Writ of Certiorari, *District of Columbia v. Heller*, Nov. 20, 2007, No. 07-290, 2007 WL 2508615, available at [http://www.scotusblog.com/movabletype/archives/DC\\_Final\\_Petition.pdf](http://www.scotusblog.com/movabletype/archives/DC_Final_Petition.pdf).

- (1) the killing of a fetus that will otherwise kill the mother (Alice);
- (2) the killing of a (possibly insane) aggressor to prevent death, serious injury, rape or kidnapping (Katharine);
- (3) the use of an experimental drug therapy to treat a life threatening illness (Ellen); and
- (4) the ability to pay for a kidney to save one's life (Olivia).<sup>118</sup>

According to Volokh, each of these women will die unless they act. Thus, each of these women is engaged in a right to self-defense, and therefore, any interference with the act is an interference with the right to self-defense:

[I]f I may kill a human or an animal to protect my life, why shouldn't I be presumptively free to protect my life using medical procedures that don't involve killing, such as compensated organ transplants or the use of experimental drugs? My hope is that people who feel strongly about the right to lethal self-defense (as I do) will agree that the moral case for medical self-defense is at least as strong as the case for lethal self-defense.<sup>119</sup>

Though I cannot engage completely with Volokh's argument here, it is important to understand the breadth of the claim that he is making. First, not only is a defender entitled to kill an aggressor, but he is also entitled to *those things that would assist* him in killing the aggressor.<sup>120</sup> By contrast, one might think that although killing culpable aggressors is included within the right to self-defense, those things that one needs for self preservation must be justified under the defense of necessity (or lesser-evils).<sup>121</sup> Importantly, the necessity defense stands on much weaker footing.<sup>122</sup> Second, Volokh believes the Constitution includes a rather

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<sup>118</sup> Volokh, *supra* note 116, at 1814–15.

<sup>119</sup> *Id.* at 1818.

<sup>120</sup> See also O. Carter Snead, *Unenumerated Rights and the Limits of Analogy: A Critique of the Right to Medical Self-Defense*, 121 HARV. L. REV. F. 1, 7 (2007) ("The proposed right to medical self-defense does not involve the use of force against an aggressor, but rather the freedom to acquire certain instrumentalities of therapeutic self-help.").

<sup>121</sup> Cf. MODEL PENAL CODE § 3.04 (1981) (self-defense) with MODEL PENAL CODE § 3.02 (1981) (lesser-evils). See also Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 247–52 (2004) (discussing the important moral distinction between self-preference and self-defense).

<sup>122</sup> See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) (questioning whether the necessity defense exists as a matter of federal common law); see also Snead, *supra* note 120, at 9–11 (articulating the problems for Volokh's view under the necessity defense).

broad right to self-defense, not only to kill culpable aggressors but also innocent aggressors (such as fetuses) and even tumors! However, this seems to ignore that what is essential to the nature of self-defense is that it is the killing of another human being for which one needs a reason.<sup>123</sup> It is a particular sort of moral claim that justifies the ending of another life. This is not necessary for killing tumors. Or, to quote Bill Murray's character from *Caddyshack*, after discovering that he was to kill gophers and not *golfers*, "We can do that. We don't even need a reason."

The Second Amendment debate may likewise rest on some unexplored assumptions about self-defense. For instance, throughout this article, I have argued that self-defense is not a political construct, but a moral right. It remains to be seen, however, whether any right to self-defense that is embodied within the Second Amendment is also such a moral right. For instance, the possible right to self-defense within the Second Amendment may be to protect political uprisings in which force is employed *against the state*.<sup>124</sup> If so, the Second Amendment would be entirely silent as to whether one has a right to a gun to protect himself from culpable aggressors and would be absolutely mute as to whether one may kill a three-year-old with a gun.

What is surprising is that at this level of controversy, the criminal law theorists who explore self-defense's parameters are absent. One might chalk this silence up to the fact that the Supreme Court has been unwilling to engage most questions of substantive criminal law and to the complaint that when the Court does engage in substantive criminal law questions, most theorists believe the Court reaches the wrong conclusions. But some of the conclusions that Kadish draws about the right to self-defense become quite intriguing at this level. For instance, recall that Kadish claims that the ability of third parties to intervene derives from the right of the defender, because giving the defender a right to the state's protection would be undermined by the state's prohibiting a third party from assisting the defender.<sup>125</sup> The same, however, might be said for gun control. And, if self-defense is just a right against the state (as Kadish claims), and if the same is true of the constitutional right, then all the work will be done by our best views of the social contract. However, this analysis will not yield *any* answers (or any constitutional requirements) as to when and if we may kill culpable and innocent aggressors.

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<sup>123</sup> See Snead, *supra* note 120, at 7–9 (critiquing the view of disease as aggressor).

<sup>124</sup> See Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113, 116 (2002) (construing the Second Amendment as an auxiliary right that "give[s] individuals the power to defend their reserved right when other forms of legal protection fail."); see also *supra* Part III.A (discussing Finkelstein's similar construction of Hobbes' view).

<sup>125</sup> Kadish, *supra* note 4, at 885–86.

### B. From Moral Right to Legal Rules

With or without a constitutional right to self-defense, all states grant a defender the right to defend himself in certain circumstances. At the level of legal implementation of moral rules, there may be reasons why the state may need to depart from the underlying morality.<sup>126</sup> Or, more accurately, the state may need to take into account moral considerations *outside* of the morality of self-defense itself in determining how to codify self-defense. As just one illustration of this problem, consider the current debate on imminence.

There is almost uniform contempt for the requirement that an aggressor's attack be imminent before the defender can act in self-defense. The standard critique of imminence is that it serves as a proxy for necessity, and thus, if defensive force is necessary before an attack becomes imminent, the defender should still be entitled to use defensive force.<sup>127</sup> The debate over imminence typically centers on when battered women kill their abusers in non-confrontational settings, such as when the abuser is sleeping. The scholarly consensus is that the Model Penal Code's requirement that defensive force be "immediately necessary"<sup>128</sup> correctly casts the balance between defenders and aggressors.<sup>129</sup> It is believed that "immediately necessary" will encompass those cases in which the harm is not imminent, but a defensive response is necessary.

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<sup>126</sup> See generally Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003).

<sup>127</sup> E.g., 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(b)(3), at 76–77 (1984) ("[P]roper application of the necessity requirement would seem adequate to prevent potential abuse of a justification defense in cases where the force is not imminent."); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 279 (2002) ("Because the requirement of imminence is an imperfect proxy to ensure that a defendant's use of force is necessary, a better standard would require that the use of force be necessary."); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993) ("In self-defense, the concept of imminency has no significance independent of the notion of necessity. It is, in other words, a 'translator' of the underlying principle of necessity[.]").

<sup>128</sup> MODEL PENAL CODE § 3.04 (1981) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is *immediately necessary* for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.") (emphasis added).

<sup>129</sup> E.g., Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 127–28 (1990) ("Imminence is relevant only because it helps identify cases where flight or legal intervention will be impossible, so that violent self-help becomes truly necessary. The decisive factor is necessity, not imminence *per se*. Thus, the proper approach is . . . to require, as proposed in Model Penal Code §3.04, that the use of force be 'necessary on the present occasion.'"); Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 69 (1994) ("Immediate necessity, not imminence of harm, should be considered essential to self-defense claims, including those asserted by battered women.").

Even if imminence only serves a proxy function (and I have my doubts<sup>130</sup>), this does not mean that imminence serves no function. Understanding the role that imminence plays as a “proxy” for necessity requires understanding why one would draft a criminal code using rules instead of standards.<sup>131</sup> Imminence is a rule, and necessity is a standard. Because imminence is designed to instantiate the necessity standard, we must ask whether there is value to having a clear rule of imminence instead of a broader standard of necessity.

Generally, there are values to having rules, as opposed to standards.<sup>132</sup> The rule promulgator may have greater moral or factual knowledge than a citizen.<sup>133</sup> When a complex decision must be made, actors who must decide under a standard—analyzing a multitude of factors—may simply get the calculations wrong.<sup>134</sup> Moreover, by having a rule, decision-making costs are reduced.<sup>135</sup> As Larry Alexander and Emily Sherwin have explained, “[t]he quality that identifies a rule and distinguishes it from a standard is the quality of determinateness. . . . [A] rule is a posited norm that fulfills the function of posited norms, that is, that settles the question of what ought to be done.”<sup>136</sup>

Imminence serves these functions that rules serve. It gives clear guidance to the defender as to when she may act. It gives clear guidance to the ex post adjudicator as to the rule by which the defender should be judged.<sup>137</sup> And it gives this clear guidance in situations in which complex calculations simply are not possible. As Whitley Kaufman argues,

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<sup>130</sup> I have argued elsewhere that imminence does not simply serve as a proxy for necessity but rather also serves as the actus reus for aggression. See Ferzan, *supra* note 121, at 252–62.

<sup>131</sup> The rule-versus-standards debate is perhaps most famously embodied in the debate between Oliver Wendell Holmes and Benjamin Cardozo. To Holmes, the “featureless generality” of negligence would ultimately give way to specific *per se* rules, such as “stop and look.” See *Baltimore & O. R. Co. v. Goodman*, 275 U.S. 66, 70 (1927); OLIVER WENDELL HOLMES, *THE COMMON LAW* 111 (1881). But Cardozo had the last word, holding that such *per se* rules could not take into account all the circumstances so as to adjudicate correctly negligence liability in future cases. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104 (1934).

<sup>132</sup> See generally LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, & THE DILEMMAS OF LAW* 11–25 (2001); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE* (1991). For a discussion of rules versus standards in the context of drafting criminal statutes, see LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN J. MORSE, *A CULPABILITY-BASED THEORY OF CRIMINAL LAW* ch. 8 (forthcoming 2008).

<sup>133</sup> SCHAUER, *supra* note 132, at 55.

<sup>134</sup> *Id.* at 150.

<sup>135</sup> *Id.* at 137.

<sup>136</sup> ALEXANDER & SHERWIN, *supra* note 132, at 30.

<sup>137</sup> Cf. Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331 (2006) (discussing the outcry for legal rules that limit the discretion of prosecutors).

the very rationale for a bright-line rule (or at least as bright a line as can reasonably be drawn) in the case of violent self-help is to minimize the room for the exercise of human judgment as to when and how much to impose harm on others in order to protect oneself.<sup>138</sup>

However, the value of the rule of imminence also comes at a significant cost. Like all rules, the imminence rule is overinclusive.<sup>139</sup> That is, there are cases in which the rule's underlying justification does not apply, but the rule does. This is the problem with imminence—there are cases where acting is necessary although the attack is not imminent. Hence, a decision to use “imminence” or “necessity” is a question about whether a rule or a standard is more appropriate given the problems inherent to both.

I cannot resolve this conundrum here. This problem is pervasive in criminal law. To receive the benefit of clear rules, we must be willing to countenance the punishment of the morally innocent because an overinclusive rule does just that—it punishes the morally innocent. I am unsure whether a retributivist can ever justify such a tradeoff.<sup>140</sup> For my purposes here, however, what is important to note is that some of our critiques of the legal right to self-defense may not be critiques of self-defense at all, but rather may present more general jurisprudential difficulties about how to translate moral standards into legal rules.

## VI. CONCLUSION

A culpable aggressor points his gun at me. It is clear that I may shoot him, but less clear why I may do so. In this article, I have argued that the answer will come from moral, not political, philosophy. The fight is between the aggressor and me. It is not about the state. Even when the state fails to protect me, I still must be able to offer an account of why my action is morally permissible.

However, the relationship between citizen, state, and self-defense is extremely complex. Depending upon the goals of the state, these goals may concord or conflict with our best moral theory. Our rules of self-defense may serve as a basis for criticizing the state, or our theory of the state may serve as a basis for criticizing the rules of self-defense. Either way, we need both theories in order to analyze the propriety of a particular legal rule. In addition, through the prism of social contract theory, we see how the state's ability to protect us is essential to the state's overall legitimacy, to its legitimacy as to unprotected groups, and to its ability to legitimately punish individuals. Finally, even our best moral account of self-defense might be only partially covered by the Constitution or might need to be contorted so as to craft action-guiding legal rules. Self-defense will be shaped by the state, even if it is not constructed by it.

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<sup>138</sup> Kaufman, *supra* note 63, at 364.

<sup>139</sup> ALEXANDER & SHERWIN, *supra* note 132, at 35; SCHAUER, *supra* note 132, at 32.

<sup>140</sup> See generally ALEXANDER, FERZAN & MORSE, *supra* note 132, at ch. 8.